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New-Years-Gift

FOR THE

Anti-Prerogative-Men :

OR,

A Lawyers Opinion, in Defence of His Majesties Power-Royal, of granting Pardons, as he pleases.

Wherein is more particularly discussed the validity of the E. of D's Pardon, by way of Letter to a Friend.

Seneca to the Emperour.

Occidere contra Legem nemo potest, servare nemo præter te

Bracton. lib. 1. c. 8. de Corona.

Rex potestatem habet jucondi de vita & membris, vel tollendi vitam, vel concedendi.

L O N D O N,

Printed, by H. H. for John Fish, near the Golden Tun in the Strand, 1682.

New-York-Gift

Gifts of the New-York-Gift

A Lawyer's Opinion, in relation to
His Majesty's Privilege, of
granting Pardon, as to the

It is more particularly the duty
of the Legislature, to be
don, by way of a letter to a friend.

Given to the Editor
of the New-York-Gift
in the City of New-York
the 1st of January 1808.

TO A. B. V. V. V.
of the City of New-York
in the City of New-York

A

New-Years-Gift

FOR THE

Anti-Prerogative-Men, &c.

SIR,

YOURS I have received, and read, wherein you are pleased to intimate to me, that you are now very well satisfied in your mind; by reading over those several Pieces I sent you, touching the Right, that my Lords, the Bishops claim to judge in Capital Causes in Parliament, as likewise the unreasonableness of excluding his Royal Highness, the Duke of York, from the Succession to the Imperial Crown of *England*; But there is yet (say you) a third scruple remaining on you; And that is about the validity of the E. of D's Pardon; Where-

Be 2 you shall fore

fore you are very desirous to know of me (seeing there is nothing hitherto purposely written on that Subject) whether I think that same Pardon good; and in case I do, you expect I should give you some Reasons why I do so.

I must tell you, that 'tis contrary to my humour to ingage my self in such kind of Controversies at any time, but more especially at this instant; you have ever known me (like your self) a great Admirer of that Principle, we commonly call *self-preservation*. However in obedience to your command, and to satisfy that obligation, which lies on me (so far as I can) to vindicate Truth, and the Father of our Countrey, in His Prerogative-Royal, I shall not value the sleeping (as they say) in a whole Skin, but shall endeavour to say something, which may not be impertinent, towards the Conviction of *Anti-Prerogative-Men*, and your own satisfaction. And in order thereunto, I think it convenient to shew you,

1. What a Pardon is.
2. By whom, and in whose Name only, all Pardons are made.
3. What things his Majesty may, and what he may not pardon.

4. Who is Judge of the validity, and invalidity of a Pardon, when pleaded in the House of Lords, or elsewhere.

And in the last place I shall give you my Sentiments in particular, concerning the Pardon, granted to the E. of D. together with Solutions to some Objections that have been made in Coffee-Houses.

A Pardon (says Sir *Edward Coke*) is a work of Mercy, whereby the King either before Attiander, Sentence, or Conviction, or after, forgiveth any Crime, Offence, Punishment, Execution, Right, Title, Debt, or Duty, Temporal, or Ecclesiastical. Or,

A Pardon (say others) is the remitting, or forgiving, any offence committed, *contra dignitatem & Coronam Regis*. Agreeable to that of *Seneca*, *Venia est pœnæ meritæ remissio* : So that *Liberatio a pœna*, is the proper effect of a Pardon, and it differs from a Dispensation thus ; a Dispensation obtained, doth *Jus dare* and make the thing prohibited, lawful to be done by the Party who hath it ; But a Pardon frees from the punishment due for a thing unlawfully done, yet freedom from punishment is a consequent of a Dispensation, though not its effect,

fect, as 'tis most ingeniously observed by the late Lord Chief Justice *Vaughan*.

In the next place I am to consider whose Prerogative it is to grant Pardons. This surely none can challenge but the King, in whom is vested the Sovereign and Supreme Authority of the Nation; this I will make good by way of Syllogism.

He, in whom is vested the Sovereign and Supreme Authority of the Nation, hath power of Life and Death;

But in the King is vested the Sovereign and Supreme Authority of the Nation:
Ergo,

The King only has power of Life, & Death.

The Major Proposition I prove thus;
Jus Gladii, Power of Life and Death, is an essential, and inseparable attribute of the Sovereign and Supreme Authority (for where there is not *Jus vitæ & necis*, there can be no Supreme Power,) *Ergo* he, in whom is vested the Sovereign Power, has power of Life and Death.

Curtius;
Et cum in
regali solio
residebis,
vita, ne-
eisque om-
nium Civi-
um Domi-
nus.
Louch's E-
lements
part. 4. sect.
4. Ad Maje-
statem spe-
ctat potestas vitæ, ac necis, cum solus Princeps primariò habet Jus Gladii.

As for the Minor Proposition, I presume no body (except a Popeling or a Whig,) but will grant that our King is Supreme Governour

nour of this Realm, and all other his Dominions, seeing our Authentick Laws and Statutes do so expressely and so often say it.

All (says *Braſton*) are under the King, and the King is under God only ; He hath no equal in his Realm (no Co-ordination here) because then he could not Command all, for amongst Equals there can be no Empire, Therefore much less are any his Superiours, or can challenge greater Power, because then he would be under his Subjects ; and *Inferiores pares esse non possunt potentioribus. Ipse autem Rex non debet esse sub homine sed sub Deo.*

Braſton,
lib. 1. c. 8.
num. 5.

Rex (says *Mr. Cambrden*) *supremam potestatem, & merum imperium apud nos habet, nec in imperii clientela est, nec investituram ab aliquo accipit, nec præter Deum, superiorem agnoscit.* The King hath Sovereign Power, and Absolute Command among us, neither holdeth he his Empire in Vassalage, nor receiveth his Investiture or Installing of another, nor yet acknowledgeth any Superiour but God alone.

By the Statutes of 24 *H. 8. c. 12.* 25 *H. 8. c. 21.* 1 *Eliz. c. 1.* & 1 *Jac. c. 1.* the Crown of this Kingdom is affirmed to be an Imperial

perial Crown : and what an Empire is, Sir *Thomas Ridley* will give you a clear Demonstration.

“ By the Empire (says that most Learned Civilian) Lunderstand not only the Empire of *Rome*, but also every several Kingdom, which acknowledgeth no other Emperour than his own Sovereign ; for howsoever they differ in Name and Title, yet is the Office it self all one ; for every one is Gods immediate Vicar upon Earth, in their own Kingdoms, for Matters appertaining to Justice.

But further, In our Oath of Supremacy we Swear, that the King is the only Supreme Governour : Supreme, so none (not the Pope) above him : And only Supreme, so none has any Co-equal, Co-ordinate, Corrival power with his Sovereignty. But it has been heretofore said by some Huntscrap Statists, That the Oath of Supremacy is taken in opposition to the Pope, to exclude the Supremacy usurped by that old Gentleman for many years. 'Tis truth they speak, but surely not all the Truth ; for there are two Points in it ;

The

Part. 2.
cap. 1. sect.
7. View of
the Civil
and Eccle-
siastical
Law.

The one, that is Negative, whereby we profess, that not any Foreign State, or Potentate, nor the Pope hath this Power: The other Positive, by which the Subject of this Power is specified. The Kings Highness is the only Supreme Governour of this Realm, as in all Spiritual things and Causes, so likewise in Temporal matters: Both Ecclesiastical and Civil Supremacy are in this Oath asserted to be in the King. It was not thought sufficient to tell who was not Supreme, but to declare also who was.

So that now (Sir) you may perceive that by our known Laws our King is Invested with such a Supremacy as excludes both Pope and People, from having any Power, Jurisdiction, or Authority over him; And if so, then certainly we may conclude that he who has Vested in him the Sovereign Power, has also *Vitæ ac necis Auctoritatem*, the sole power of Life and Death, to save or destroy, as well to pardon as to punish Offenders.

Next come I to consider what Offences the King (as Supreme Governour of this Realm) can pardon or remit, and what he cannot as to Temporal matters.

In the first place I shall shew you what things the King cannot pardon, according to the Laws of *England*; as for example,

In an Appeal of Death, Robbery, Rape, &c. the King cannot pardon the Defendant, for the Appeal is the Suit of the Party, to have Revenge by Death; and whether the Defendant be attainted by Judgment, &c. or by Outlawry, the Kings Pardon shall not discharge the Defendant.

So in an Attaint by *A.* against the Party, and the Petit Jury against the party to have Restitution; this the King cannot pardon.

So the King cannot pardon Nuzances, that are (not transient but) continuing; as a Nuzance in *Via Regiâ*, that still continues and is not ended, until removed; and so of a Water-course diverted, or Bridge broken down, they cannot be pardoned, so as to acquit the Nuzance-maker, for Committing them.

So a Mayor of a Town, or other Toll-taker, who is penally bound to provide the Market-Measures, and doth not, cannot be pardoned by the King, because the fault still continues.

11 R. 2.
Chr. 17.
2 R. 3. 8.
Co. 3. Inst.
f. 237.

13 E. 4. 5. a.
Co. 3. Inst.
237.

Co. 3. Inst.
237. c. 20.
2 part
Dewell. v.
Saunders.
Davis
Rep 75. a. b.
Vaughans
Rep. Tho-
mas v. Sor-
rel.

Vaughans
Rep. Edm.
Thomas. v.
Sorrel.

So if one be bound in a Recognizance to the King, to keep the Peace against another by name, and generally all other Subjects of the King; In this Case before the peace be broken, the King cannot pardon or release the Recognizance, although it be made only to him, because it is for the benefit, and safety of his Subjects.

1 H. 7. 10.
11 H. 7. 12.
Co. 3. Inst.
238.

So after an Action popular be brought, *Tam pro Domino Rege quam pro seipso*, according to any statute, the King cannot discharge the Informers part, because by bringing of the Action, the Party hath an Interest therein.

1 H. 7. 3. a.
Co. 3. Inst.
194, 195.
238.

Come I now (Sir) to demonstrate what Offences the King can pardon by the Law of England.

If a Man Arrested for Felony, break Prison, he loses his Battel, but if the King pardon that breaking of Prison, the Defendant shall be restored to the Battel, and the Counterplea taken away.

Co. 3. Inst.
237.
Hobarts
Reports
Cuddington v. Wilkins f. 82.

So in divers cases at the Suit of the Party, when the Defendant either by the Common Law, or by any Statute (besides the restitution or damage of the Party, Plaintiff) is thereby also to have exemplary punishment,

ment, the King may pardon the same; as first, for instance at the Common-Law.

In an Attaint by *A*, against the party and the Petit Jury; against the party to have restitution, this (as is said before) the King may not pardon: Against the Petit Jury, by the Common-Law, *That they should lose Liberam Legem, their Wives and Children cast out of their Houses; their Houses wasted, their Trees prostrated; their Meadows ploughed up, their Goods and Chattels seized, and their Bodies taken*, This the King may pardon; because it is a punishment, exemplary to deter others, and tendeth not to the restitution or satisfaction of the Plaintiff.

Now to offer Instances upon Statute-Law. The Defendant in an Appeal of Murder, upon Not Guilty pleaded, was found Guilty of Man-slaughter: And it was resolved by the Judges upon Conference betwixt them, That the Queen may pardon the burning of the Hand, for that is no part of the Judgment at the Suit of the Party Plaintiff in the Appeal; but it is a collateral, and exemplary punishment inflicted by the Statute of 4 H. 7. c. 13.

So upon the Statute of *Westm. 2. c. 25.* that

Co. 3. Inst.
237.

Co. lib. 5.
f. 50. Bug-
gins. Case.
Co. 3. Inst.
237.
Hobarts
Rep. f. 11.
294.
Searle v.
Williams.

Co. 3. Inst.
f. 171,
237.

that giveth two years Imprisonment, in a Ravishment of Ward, the King may pardon the said corporal punishment of Imprisonment.

So upon the Statute of *Westm. c. 20. De Malefactoribus in parcis*, the Damages concern the Plaintiff, and therefore the Kings pardon cannot dispense with them; but the Ransome, the finding of Surety, and the forjuring the Realm, are punishments exemplary, and concern the King, and therefore he may pardon the same.

So there is a Clause in the Statute of *5 Eliz. c. 14.* That the Plaintiff shall not release nor discontinue the punishment, &c. but only Costs and Damages: and yet it was resolved, that the Queen might pardon the corporal punishment, that doth trench to common example.

So before any Action popular brought, the King may discharge the whole, because the Informer cannot bring an Action or Information originally for his part only, but must pursue the Statute.

So the breaking the Assize of Bread and Ale, the forestalling the Market, Ingrossing, Regrating, or the like, which continue not, but

15 Eliz.
Dyer 323.
9 Eliz.
Dyer
269. Co. 2.
Inst. 200.

15 Eliz.
Dyer 322.
Taverners
Case, Co.
3. Inst.
171.

1 H. 7. 3.
Co. 3. Inst.
194, 195,
238. 37 H.
6. 4.

Vaughans
Reports,
Edward
Thomas v.
Sorrel.

but are over as soon as done, until done *de novo* may be pardoned by the King; so as the Offender shall not be Impleaded for them, otherwise than by persons that have received particular damage, which the King cannot remit.

Vaughans
Reports,
Edward
Thomas v.
Sorrel.

To conclude; Although the King cannot acquit Nuzance-Makers for committing Nuzances, yet the Fine or punishment imposed for the doing them, may be pardoned by the King.

Thus (Sir) having given you a true extent and latitude of his Majesties pardoning Power, that is to say, what the King may, and what he cannot pardon, relating to matters Temporal, I come to the next particular proposed in the beginning, And that was to shew, who ought to be Judge and Interpreter of Pardons granted by the King, as to the validity or invalidity of them; when pleaded in the high Court of Parliament.

That with the Sovereign Prince, resideth the prime and supreme Power of interpreting of his own Laws, Rescripts and Grants, cannot be denied; for both the Common and
Civil

Civil Law Professors do affirm, *That in doubtful and obscure points, the interpretation and will of the Prince is to be expected, since it is his part to interpret, who made the Law or Grant.*

Bracton
lib. 2. c. 16.
num 3.
Fleta lib. 3.
c. 14. num.
4. D. 28. 6.
43. D. 50.
17. 191. c.
1. 14. 12.
1. Princeps
conditor,
& inter-
pres Le-
gum uni-
cus,

Now our King as the supreme Legislator and interpreter, has communicated this his Authority to some particular persons, for the interpreting and expounding his Laws and Grants ; And the reason why he has so delegated this power to them, is rendred by *Fortescue* thus ; *You shall better (says he to H. 6.) execute Judgment by others , than by your self ; neither hath it been seen that any King of England hath pronounced Judgment with his own mouth.* The former part of *Fortescue's* words are Orthodox, but the latter part are not so : If the famous Anti-quary, Mr. *Selden*, may be credited ; for he in his Notes *ad cap. 8.* of *Fortescue* affirms, that Kings themselves often sate in Court, in the Kings-Bench : and in the Rolls of Charters under King *John*, and the time near him, often occur Grants that such or such English should not be Impleaded, or put to Answer, *nisi coram nobis, vel Capitali Justitia nostra*, and to Normans, *nisi coram nobis, vel Capitali*

That
Kings have
in former
times per-
sonally
sat in the
Kings-
Bench.
Vide Co.
Litt. 71. b.
Camdens
Britannia
in Engl. f.
178.
Sir Henry
Woottons
Hist. of
Christen-
dom, f.
213.
Co. 4. Inst.
73.
Co. 4. Inst.
f. 15. Co.
lib. 13. f.
63.

Capitali Seneschallo nostro. Here *coram Ca-*
pitali Justitia is divided from *coram Rege*,
the last signifying before the Kings person;
although now Pleas held in the Kings-Bench
before the Successor of the *Capitalis Justitia*,
are entred *coram Rege*: But *è diverticulo in vi-*
am, we will return to the point proposed, and
shew you who are the competent Judges of
the validity or invalidity of a Pardon pleaded
in the house of Lords. In order thereto we
must distinguish betwixt matters moved in
the upper House of Parliament, that concern
the Customs and Priviledges thereof, and
those matters that purely concern the com-
mon and Statute Laws of the Realm.

The former must be determined adjudg-
ed and discussed by the course of Parlia-
ment, and not by the Civil Law, nor yet
by the Common Laws of this Realm, used
in more inferiour Courts; which was so
declared to be *secundum Legem & consuetu-*
dinem Parliamenti, concerning the Peers of
the Realm, by the King, and all the Lords
Spiritual and Temporal; and the like *pari*
ratione is for the Commons, for any thing
moved, or done in the House of Commons.

But on the other side, if any question a-
risseth

riseth meerly upon the Common or Statute Law, the Judges of *England* are to give their Opinions, when ever it be demanded by the Lords, in their House; as for instance, if a Pardon be pleaded by a Peer, or any other person there, and 'tis doubted whether it be good or not in Law: This *Query* (I humbly conceive) must be referred by the Lords to the Kings Justices for their solution.

Vide Sir Robert Filmer's Patriarcha, where you may see, of what Authority the Opinion of the Judges hath been in Parliaments.

And as all the Judges, or the majority of them shall declare themselves, (*pro* or *con*) the Lords of Parliament, are wont usually to determine and give sentence accordingly; But if the question be, whether the manner and circumstances, that attend such a Pardon, be valid or not, by the Custom and Law of Parliament, then the Lords of Parliament themselves, are solely to decide the doubt, without any Reference to the Opinion of the Judges, for they are not to intermeddle with any Matters of Parliament; and so have they in several Parliaments confessed.

Vide Cottons Collected f. 651. 31 H. 6. num. 27.

This (Sir) may suffice as to the fourth particular by me propounded, and now I hasten to the last point of all, and that is to

D

consider

consider of the E. of D's Case in particular, but before I shall handle it, I must tell you this, That where-ever I have or shall mention Peers or Lords of Parliament, I intend as well the Lords Spiritual as the Lords Temporal ; for I am very well satisfied now, (as I understand you are) that the Lords Spiritual have as much Right, in virtue of their Temporal Baronies to sit in Capital Cases, as the Temporal Lords can pretend to, and I am verily perswaded, that there was never any Criminal Cause handled in Parliament, where the Lords Spiritual did not sit either personally or by Proxy ; And if not one of these ways, yet undoubtedly they upon their withdrawing, ever entred their Protestation for the saving of that same Right and Priviledge. And so I now come to treat of the validity of the E. of D's Pardon.

And I take this (Pardon me if I mistake) to be his Case.

*E. of D's
Case.*

The E. of D. is impeached before the Lords, by the Commons of England, of High Treason, and of several other misdemeanors; But before any further proceeding in proof of the Charge against him, His Majesty dissolves that Parliament, and

and upon the dissolution thereof, the King grants to the E. of D. a Pardon of all Treasons and Misdemeanours whatsoever ; And then His Majesty calls another Parliament, whereat the Commoners exhibit new Articles of the same Treasons and Misdemeanors against the said Earl ; whereupon he pleads the said Pardon to this second Impeachment in the House of Lords.

Now the Question will be, whether this *The Query.* Pardon be good or not ? The Resolution whereof will depend on an Answer given to this Query following : viz.

Whether his Majesty, by virtue of his Prerogative-Royal can pardon, in the interval of two Parliaments those Crimes, whereof the E. of D. was impeached in the former Parliament ?

I humbly conceive, That his Majesty can by His Prerogative-Royal, grant such a Pardon. I presume it will be admitted, that had this Pardon been purchased before any Impeachment in Parliament, it had been good ; But the granting of it, after Arti-

cles exhibited in the House of Lords, makes the doubt, which I shall endeavour thus to clear.

The *Commons*, 'tis true, as the general Inquisitors of the Realm, have authority from the King, to examine any Crime, be it Treason, Felony, Oppression, Bribery, Extortion, or the like, committed by a Lord of Parliament, Spiritual or Temporal; and if they find by the Vote of the House, the Charge to be true, they have power to transmit the same to the Lords, with the Witnesses and Proof.

As for the Peers, they are the Supreme Court of Judicature in this Nation, not only to judge whether matters presented to their Lordships by the Commoners, be fit or requisite for the King to pass into Laws, but also of Writs of Error, and of Matters of Fact, either not determinable in other Courts, yet in regard of nicety or special Matter, they cannot well discern or judge.

Moreover to these Lords of Parliament belongeth a power (and that derived from the Crown)

Crown) of giving Judgments in Cases of Treason, of Impeachments for several Crimes, of Slanders of Peers, of Breaches of Priviledges, both upon Peers and Commons, together with Capital Censures of Beheading, Hanging Drawing, Quartering, Imprisonment, Banishment, Fine and Forfeiture both of Lands, Goods and Offices inflicted on Offenders.

Now these two, The Lords and Commons, I mean, are convened by the Kings Writs, to assist him with their Advice in difficult and weighty Matters; relating to Church and State; And in so doing they ease their Sovereign Lord of much Labour, but do not thereby deprive him of any one Tittle of Royal-Power. *They may (says the most glorious Royal Martyr) remember, that at best they sit in Parliament as my Subjects, not my Superiours; called to be my Counsellors not Dictators: Their Summons extends to recommend their Advice, and not to command my Duty.*

You must know, that by calling a Parliament (which is but a Meeting of the King

King and his Subjects, (and such they continue as well collectively as they were before singly,) and a Meeting in its own nature dissolvable at pleasure) the King is not grown less, or departed with any thing either by way of Abdication or Communication of the sovereign Power that is vested in him, as King of *England*. That were indeed to make more than one Sovereign in a Kingdom; a thing altogether inconsistent with Supremacy and Monarchy: So that the Sovereignty must be totally in the King, and where that is there must be *Gladii potestas*, the power of Life and Death, a Right as well of pardoning as of punishing Offenders. Like as divers other things do solely belong to the King, as Prerogatives incident to His Imperial Crown and Royal Dignity, whereof the Subject hath nothing to do, as the power of Calling, Holding, Proroguing and Dissolving of Parliaments, of advancing to Honours, Offices and Commands, of raising of Armies, of entering into Leagues and Treaties, of Founding Corporations, Guilds and Fraternities, of coining of Money, of making Letters of Denization, to whom and how many

many he will ; Together with many other things that appertain to His Majesty as special Flowers of His Crown.

The King of *England* (I must confess) may limit himself by Promise or Contract in Parliament (as he hath been pleased to restrain himself from the use of that power, which makes new Laws and repeals old, without the consent of the Lords and Commons in Parliament, as likewise from raising Money upon the Subject without their consent) not to pardon the Offences of such Persons as are before Impeach'd in the High Court of Parliament, without the consent of his two Houses, or the like : But then I must demand, that such a Grant be produced ; let it be made appear by an authentick Record, that the King of *England* has done so ; And when such a Record is shewn, I shall be as ready to plead against the validity of the E. of D's Pardon, as I do now for it ; Till then I desire to be excused. Besides, 'tis not enough to affirm, That there cannot be found any President in the Parliament Rolls, wherein any Peer of the Realm has been pardoned by the King,

King, after an Impeachment has been transmitted to the Lords by the Commons; but a President must be offered to prove, That a Pardon has been adjudged void, where it has been pleaded by a Peer in a later, that was charged with High Treason in a former Parliament.

But further yet (Sir) If the King can under his Great-Seal command all Process, and proceedings in Criminal Causes to cease against one accused before in Parliament, then sure, what should hinder, but the King may pardon such a one. For a discharge of any further proceeding against such a one directed to the Judges, and their Award thereon, *That the Party accused shall go, sine die*, is equivalent to a Pardon under the Broad-Seal of *England*, now that there hath been such a kind of discharge, and thereon an Award given by the Judges in the King-Bench to that purpose, I will make good by this Record following.

Pasch. 4.

7 E. 3. Co-
ram Rege

Rot. 53.
Co. 3. Inst.

239.

Steven Gravesend, Bishop of London, was accused in Parliament, for adherency to Edmond Earl. of Kent in his Treasons, where
by

by Order of Parliament the matter was referred to the Kings-Bench to be tryed, where the Bishop pleaded Not-Guilty, and afterwards was discharged by the Kings Writ under the Great-Seal, directed to the Judges of the Kings-Bench, to this effect.

Licet venerabilis Pater Stephanus, London Episcopus, per breve nostrum coram nobis ad sectam nostram implacitetur de eo, quod ipsi Edmundo nuper Comiti Kantix adhæsisse debuerat : Quia tamen prædict. Episcopus de adhæsione, prædict. omnino immunem reputamus ; vobis mandamus, quod placito prædict. coram nobis ulterius tenen. omnino supersedeatis.

Teste meipso apud Westm. 12 die Decembr. Anno Regni nostri 4.

The Award of the Court that is given thereupon, is very remarkable, viz.

Cujus brevis prætextu consideratum est, quod prædictus Episcopus eat inde sine die, &c. Et ulterius non procedatur versus eum.

Sir Edward Coke upon this same Record comments thus ;

This man, it may be, thought, that the taking of the Pardon should be an implied Confession of the Fault, and therefore went a new way : but no man that is wise, and well advised will refuse God and the Kings Pardon, how often soever he may have it ; for there is no man but offendeth God, and the King almost every day, and the Pardon is the safest and surest way.

Out of this notable President, and the Comment of Sir Edward Coke thereon, we may make these several Remarques.

First, That though *Steven Gravesend* was charged with High-Treason before in Parliament, yet the Judges of the Kings-Bench, upon the Kings Writ to them directed under the Broad-Seal, did award, that the said *Steven* should go *sine die*; *Et ulterius non procedatur versus eum.*

Secondly, That this same Award was given by the Judges, before any Sentence or Judgment passed, either by themselves, or by the Lords in Parliament.

Thirdly, That if this manner of proceeding with *Steven Gravesend* had been contrary to the Laws and Customs of Parliament, the Lords and Commons would no doubt have disputed the Kings Prerogative in this Case; And I cannot learn out of any Antiquary, or Historian, that this same Bishop of *London* was ever questioned afterwards in Parliament, or the Kings-Bench Judges for thus obeying the Kings Writ.

Fourthly, That if this manner of proceeding

ceeding in *Gravesend's Case* be valid in Law (as it is, otherwise my Lord *Coke* would have told us so) then a *Fortiori*, the Kings granting a Pardon to the E. of *D.* must be much more; For *Coke* says, that a Pardon is the safest and surest way. So that we may conclude, That either way is good, though that of a Pardon be the safest and surest. Is not a Fine and Common Recovery the safest Conveyance for the passing of Lands. And yet a Translation by Feoffment, by Bargain and Sale, &c. is a good Conveyance, though not the safest and surest.

In a word, Sir *Edward Coke* does not at all intimate unto us, that either way is illegal, but only gives the Bishop a Reprimende for his Impudence, in not embracing the best expedient, when he had the choice of two.

Sir, If what I have said in defence of the E. of *D's* Pardon, give you any satisfaction, I shall be glad; But now I think on't, my Papers will be the more welcome, if I return you Solutions to those Objections that have been started at Coffee-Houses, and indeed mentioned in your Letter. The

The first Objection is, say you, a notable distinction, made betwixt Offences committed against the Crown, and Offences perpetrated against the State or Commonwealth ; the former the King may pardon, but by no means the latter.

I answer, That this is a distinction without any diversity ; For I affirm, that whatsoever is done against the State or Commonwealth, is done against the Crown, *Et è contra*. I am sure in all Monarchical Governments, the learned Sir Henry Hobart in his Reports, tells us, *That the King and the Commonwealth, make but one ; That the King is the Head of the Commonwealth, and the Reformation of all general wrongs belongs to him ; And, Cujus est condemnare, punire, ejus est absolvere, ignoscere ; Qui damnare potest (says the Civil-Law Text) is absolvendi quoque potestatem habet.* And therefore in all our Indictments, it is said, That such a thing was done, *Contra dignitatem & Coronam Regis ;* But I never read, that such a thing was perpetrated *Contra rem publicam, or statum populi Anglicani,* unless it were in the

Hobarts
Reports f.
342. Sheff-
fields Case.

Idem, Cud-
dington v.
Wilkins.

the late Usurpation, when this our glorious, antient and hereditary Monarchy was turned into a Democrattick Slavery, under the Title of *The Commonwealth of England*. I shall further add, to what I have already said, towards the utter confusion of this distinction, viz.

That His Majesty can by virtue of His Royal-Power, either before Attainder, Sentence or Conviction, or after, pardon all Crimes whatsoever, and remit all punishments, exemplary, to deter others, and not tending to the satisfaction or safety of particular Persons. In short; he can pardon all manner of Crimes, that are transient, and not continuing before Sentence, or Conviction; And if the E. of D. be guilty of such Offences as are permanent and continuing, pray let the *Anti-Prerogative-Men* name them, and in so doing they will very much oblige the World. All this our Books of Law are ready to make good, as you have read before in this Discourse.

But then it may be replied, That although the King can pardon any Crime (be it Treason

son, Felony, Bribery, Perjury, Extortion or the like) before Attainder, Sentence or Conviction, or after ; yet if an Impeachment be once lodged in the Lords House against any Person, that Person cannot be pardoned, until he be convicted, and hath received Sentence.

To this I rejoyn thus ; It must be granted me, as I have said before, that if the E. of D. had procured the Kings Pardon, before any Articles had been by the Commoners exhibited against him, the Pardon had been good ; And why it should not be so afterwards passeth my comprehension ; For the Impeachment in Parliament does neither alter the nature of the Crimes, nor is the Kings Power of pardoning any way lessened thereby ; the Crimes are the same after an Accusation in Parliament, as they were before, they are, nor greater, nor lesser, Treason is Treason, Felony is Felony, and the like of other Offences ; And as for the Regal-Authority in granting Pardons, it continues the same as well after as before ; the King of *England* being as free and absolute a Monarch, in a Session of Parliament as

as out of it, which no able Jurist, I am confident, will deny.

Thus much in answer to your first Objection.

Your other Objection is this, That the E. of D's Pardon is not valid in Law; because it is but a Stamp-Patent by Creation, having not passed the Seals, as Statute-Law requires.

As to this Objection, I give you this Answer; There are but two Statutes (if I mistake not) that prescribe a Course or Form, for passing things under the Kings Seals.

The one of these same Statutes is the 13 R. 2. c. 1. how Charters of Pardon ought to pass; wherein it is provided:

1. That in a Pardon for Murder, Treason, Rape, &c. The Offence committed, shall be specified, and if there be not such a specification, the Charter must be disallowed, I suppose, the E. of D's Pardon is not defective in this point.

2. That no Pardon of Treason or Felony shall pass without Warrant of the Privy-Seal, together with a Forfeiture of him, at whose Suit such a Pardon is obtained. This latter clause is wholly Repealed, and annulled by the 16 R. 2. c. 6. And therefore it affects not the E. of D's Pardon at all.

The other Statute is the 27 H. 8. c. 11. wherein is set down the course of suing forth Grants under the Kings Sign Manual, &c. Now if this Statute doth extend to Charters of Pardon as it doth to other Grants (which perhaps may be so, because every Pardon is a Grant from the King, yet neither of them (be it Charters of Pardon, or other Grants) are declared *ipso facto* void; If the course prescribed by this Act be not observed; But only it is said, That before any Grant be passed under any of the Kings Seals; It shall be delivered unto the Kings principal Secretary, or to one of the Clerks of the Signet, to be at the said Office passed accordingly, together with a penalty inflicted on the Clerk, that shall alter the course prescribed, and no more.

I will offer you an Instance ; A Parson Marrys a Couple, that may lawfully marry, without any Banes or Licence. and in a private House, and not according to the Canonical Hour ; This Parson, for acting contrary to the Canons of Holy Church, is lyable to a Suspension, &c. But yet the Marriage shall stand good and firm in Law. For *multa sunt, quæ impediunt promovendum quæ non dejiciunt jam promotum : Fieri non debuit, sed factum voluit.* So (say I) in the E. of D's Case ; If the Pardon (which is but a Stamp-Patent by Creation) had passed all the Offices, or some or one of them, the Officer, or Officers had peradventure been lyable to a Parliamentary Reprimend, yet notwithstanding the E. of D's Pardon is valid and good in Law, *Contra omnes Gentes.*

To be short, the Rule of Holy Scripture is, in the Case Matrimonial, *Whom God hath joyned together, let no Man put asunder ;* So in the Case of Pardons, what his Majesty by His Prerogative-Royal hath knit together (*viz.* His Mercy and the E. of D's Life,) Let
not

not the Lords and Commons endeavour to separate. *Sacrilegii instar est* (says the Civil Law) *divinis obviari beneficiis*, That is to say, *Rescriptis Principum adversari*.

And as I plead for the E. of D's Pardon, so I hope, my Plea will not prove a Scandal to others; I am sure it will not, if they do but consult *Seneca* in his Controversies;

Iniquum est (says he) *Collapsis manum non porrigere: Commune hoc jus generis humani est, nemo invidiosum jus postulat, quod alteri profuturum est*.

Thus (Sir) having given you freely my poor Sentiments, touching the E. of D's Pardon, I shall close my Paper with the very same words that a late Author useth; And they are these:

I take it for one of the greatest happinesses of our Government, That His Majesty hath an undoubted free Right of granting Pardons as he pleases: And for argument of inconvenience, it may as well be urged against any Act of Mercy,

cy, the King shews ; Every Act thereof being as inconvenient to some as it is merciful to others, And therefore hath the King only been Judge in all Ages, when and where he will dispense it, and the People would be in a miserable condition if it were otherwise.

F I N I S.

In the Title Page, in the Quotation of *Bracton*,
for *jucondi*, read *judicandi*.





